Filed 5/10/10 In re N.E. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re N. E., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. N. E., Defendant and Appellant.	A126102 (Sonoma County Super. Ct. No. 36037-J)

Defendant N. E. appeals a dispositional order of the Sonoma County Juvenile Court, declaring him a ward of court pursuant to Welfare and Institutions Code section 602[1] and placing him on home probation. Defendant contends the trial court erred by failing to place him on Deferred Entry of Judgment (DEJ). Defendant also challenges conditions of his probation banning him from possessing bomb making materials and using marijuana for medical purposes. We reverse the juvenile court's declaration of wardship and remand the matter for reconsideration of denial of DEJ and clarification of the challenged conditions of probation.

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2009, the Sonoma County District Attorney (DA) filed a wardship petition pursuant to section 602, subdivision (a), alleging that on or about July 4, 2009, defendant "did willfully and maliciously explode and ignite a destructive device and explosive causing mayhem and great bodily injury, thereby violating section 12310(b) of the Penal Code of California, a felony (LIFE)." Defendant was 17 years and three months old at the time of the offense alleged in the petition.

On July 20, 2009, Defendant appeared in juvenile court with his counsel. After the juvenile court fully advised defendant of his constitutional rights, defendant's counsel stipulated to a factual basis for the allegation, and defendant admitted that on July 4, 2009, he exploded a destructive device as alleged in the petition. Thereafter, the juvenile court found the allegation true and referred the matter to the probation department for a report and an assessment of defendant's suitability for DEJ.

The report and recommendation of the probation officer (report) was filed on September 3, 2009. According to the report, defendant described the events surrounding the explosion to the police as follows: Defendant decided he wanted to do something "fun" on the fourth of July, so a few days beforehand he looked online for instructions on how to build an explosive. Defendant discovered the "Anarchist Cookbook" and located instructions on how to construct a pipe bomb. On July 3, 2009, defendant went to Orchard Supply Hardware and purchased a piece of metal pipe. Using the metal pipe, black powder that his father stores for their Civil War re-enactment activities, and fuses from fireworks purchased locally, defendant built a pipe bomb. On July 4, defendant went to Lucchesi Park in Petaluma and looked for a place to detonate the bomb. Before igniting the bomb, defendant saw a person he knew named Colin walking in the area. Defendant placed the bomb on the floor of a portable restroom, ignited the fuse, and took shelter behind a nearby light pole to await the explosion. When the bomb exploded, defendant heard a scream, ran off a distance, then walked home. At home, defendant and his family set off some fireworks. After twenty minutes or so, defendant drove back to where he set off the bomb to see the damage it had caused. As he approached, defendant

saw police and medical personnel at the scene, so he returned home. The following day defendant learned Colin had been injured in the bombing.

Further, the report describes as follows how the victim was found and treated. Around 10:30 p.m. on July 4, a pedestrian flagged down a Petaluma police car and told the officer that she heard a loud explosion coming from the area of Lucchesi Park, then saw someone stumble out of the park into the parking lot and collapse. When the officer arrived at the parking lot he found Colin lying on his side bleeding from a wound in his back. Colin was transported to hospital where he had surgery to remove a round piece of metal from his back. The piece of metal was approximately one inch in diameter and appeared to be a piece of an iron pipe cap. Police interviewed Colin at the hospital on July 5. Colin told police that shortly before the explosion he saw two people in the park whom he recognized — defendant and another person named Raymond. Colin attempted to say hello to defendant but defendant walked past and did not acknowledge him. Colin heard Raymond yell "do it" and observed defendant enter the portable restroom. Moments later, Colin heard a loud explosion and felt a sharp pain in his back.

The report states that the metal pipe cap penetrated Colin's back one inch from his spine. The cap penetrated three inches into Colin's body, puncturing his lung and fracturing four ribs. Surgeons had to remove one half of the injured lung. Subsequently, when surgeons tried to remove the chest tubes that had to be inserted while Colin was in the Emergency Room, his lungs collapsed and as a result the other half of the injured lung had to be removed.

In regard to defendant's suitability for DEJ, the report notes defendant's "callous act of constructing and igniting a pipe bomb which severely injured the victim," his unwillingness to come forward after learning he had injured someone, his denial of the offense when first confronted by the police, and his failure to render any assistance after hearing the victim's scream. The report opines that these facts demonstrate a lack of remorse on defendant's part. On the positive side, the report notes defendant has no probation history and is a "bright and intelligent individual" from a supportive family who "has the skills and traits necessary to follow his goals and attend college." The

report recommended that despite defendant's positive traits, he should not be found suitable for DEJ "due to the circumstances surrounding the offense, the damage and pain . . . inflicted upon the victim, and the need for this department to provide intensive supervision services to the minor." The report also referenced Penal Code section 12311, noting that had defendant committed this offense as an adult he would be facing a mandatory prison term with no possibility of receiving probation.

At the dispositional hearing on September 3, 2009, the juvenile court stated it had read and considered the probation report as well as the many letters of support provided on defendant's behalf. The court noted that the report recommended defendant be found unsuitable for DEJ and asked for the People's position on the matter. The prosecutor stated that the People opposed DEJ "based on the seriousness of the offense and the amount of injury caused." Defense counsel did not offer argument on the DEJ issue.

The court stated that in crafting a disposition it had to balance concerns about defendant's rehabilitation with concerns for public safety. Regarding the crime, the court stated that defendant did not act on impulse but rather devoted considerable time and energy to researching and constructing the bomb. The court also stated that after building the bomb, defendant made the further decision to detonate it, not in a remote location, but in a public park on July 4 "when everybody is out at night."

Regarding disposition, the court stated that DEJ is "one of the least supervised programs on the probation case load. Least supervised. Kids are given community service work, they're told to go to school, get good grades. That doesn't seem to be an issue with N. E. He does that because he wants to. [¶] But they don't do a lot on the [DEJ] program. They're told they have to stay out of trouble for a year. We monitor them in court twice. At the six-month review and the 12-month review. And if they do their programs, they've completed the program and they're out the door. I do not believe that is sufficient supervision for [defendant]." The court also stated that the "other difficulty with [DEJ] is if there's a violation, there's no way to quickly resolve the problem. . . . [¶][¶] If [defendant] was a graffiti person, I wouldn't worry about this so much, . . . [¶] . . . [¶]. . . I'm going to weigh on the side of safety and say . . . the

probation department has to be able to supervise [defendant] adequately in a timely fashion."

Following these observations, the juvenile court found defendant not suitable for DEJ, declared him a ward of the court and placed him on probation in the home of his parents. The court imposed various conditions of probation, including a condition that defendant use no marijuana. In this regard, the court stated, "He's been testing clean. That's fine. I am very concerned about his level of marijuana use. Daily marijuana use is not recreational, and it's illegal for somebody of this age. And given what I have here, it will absolutely not be tolerated, because I can't tolerate anything that is going to drop his inhibition level." The court also ordered that defendant should have no access to firearms or black gunpowder, stating, "No weapons can be in the house. Either replicas or antiques or anything. I know this family has enjoyed participating in re-enactments. All of that stuff has got to be housed somewhere else." The court further ordered that defendant have no access to bomb-making materials. In this regard, the court stated: "He's to have nothing that remotely — I can't say it that way. I know people have things in their garage, okay? They've got tools, . . . lawn mowers, they've got all kinds of automotive equipment. But there's got to be some way we can control what he picked up at Orchard Supply. There can be no materials in the house, outside the house, on their grounds, or in the garage that could be utilized to make a pipe bomb."

The dispositional findings and order (order) were signed by the juvenile court judge and filed on September 3, 2009, the same date as the dispositional hearing. In the "Terms and Conditions" section of the order, a notation in handwritten capital letters states, "Court denies minor possess/use medical marijuana." Defendant filed a timely notice of appeal on September 11, 2009.

DISCUSSION

A. Legal Standards for DEJ

The deferred entry of judgment provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558 (*Martha C.*).) "The

sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed." (*Ibid.*, citing §§ 791, subd. (a)(3), 793, subd. (c).)

A minor is eligible for deferred entry of judgment under section 790 if all of the following circumstances apply: "(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code." (§ 790, subd. (a)(1)-(6); *Martha C., supra,* 108 Cal.App.4th at pp. 558-559; see also Cal. Rules of Court, rule 5.800(a)(3).) In this case, there is no dispute that defendant is eligible for deferred entry of judgment.[2]

Once eligibility is established, the court must make an independent determination of the minor's suitability for deferred entry of judgment. (See *In re Sergio R.* (2003) 106 Cal.App.4th 597, 605 (*Sergio R.*).) Section 790 empowers but does not compel the juvenile court to grant deferred entry of judgment, and the court exercises its discretion in this regard based upon "the standard of whether the minor will derive benefit from 'education, treatment, and rehabilitation' rather than a more restrictive commitment." (*Sergio R., supra,* 106 Cal.App.4th at p. 607.) The suitability factors include the minor's

---

[2] Whereas defendant's violation of Penal Code section 12310, subdivision (b) carries a life sentence for an adult offender, the offense is not among the offenses listed in section 707, subdivision (b) which render a minor ineligible for DEJ.

age, maturity, educational background, family relationships, motivation, any treatment history, and any other factors relevant to the determination of whether the minor is a person who would be benefited by education, treatment, or rehabilitation. (*Ibid.*; § 791, subd. (b); Cal. Rules of Court, rule 5.800(d)(3).) Where a minor is eligible, a denial of DEJ "is proper only when the trial court finds the minor would not benefit from education, treatment and rehabilitation." (*Martha C., supra,* 108 Cal.App.4th at p. 561.) We review a court's denial of deferred entry of judgment for abuse of discretion. (*Sergio R., supra,* 106 Cal.App.4th at p. 607.)

B. Analysis

Defendant contends that the juvenile court's DEJ ruling was an abuse of discretion because it failed to consider whether he was amenable to education, treatment and rehabilitation, and denied DEJ on the basis of impermissible factors such as the "serious nature of the crime, the injuries of the victim and the inadequacies of the local [DEJ] program." Respondent defends the juvenile court's decision to deny DEJ on the basis that the probation report provided information regarding factors relevant to DEJ suitability such as "defendant's age, maturity, educational background, family relationship, demonstrable motivation [and] treatment history," which the juvenile court considered. Also, respondent asserts that the trial court properly considered "other mitigating and aggravating factors" in determining DEJ suitability.

We find defendant's contention persuasive in that it is unclear from the record whether the juvenile court exercised its discretion to deny DEJ under the proper standard. Accordingly, we remand for the juvenile court to reconsider the issue in light of the concerns we express below.

When the juvenile court grants DEJ it must make specific findings on the record in support of that decision. (§ 790, subd. (b) [stating that if the court grants DEJ it "shall make findings on the record that a minor is appropriate" for DEJ].) By contrast, there is no statutory requirement that a court make specific findings in support of its decision to *deny* DEJ. (See *ibid.*) Rather, the statute states that if the minor is eligible for DEJ and

the court finds that the minor is also suitable for DEJ "and would benefit from education, treatment, and rehabilitation efforts, the court *may* grant [DEJ]." (*Ibid.* [italics added].) The court's discretion whether to grant DEJ to an eligible and suitable minor, however, is not unbounded: Rather, the court's proper exercise of discretion on this issue is tethered to the "the standard of whether the minor will derive benefit from 'education, treatment, and rehabilitation' rather than a more restrictive commitment." (*Sergio R., supra,* 106 Cal.App.4th at p. 607.)

In this regard, we note that the probation report mentions such eligibility factors as the minor's age, maturity, educational background, family relationships, and motivation. (See Cal. Rules of Court, rule 5.800(d)(3) [listing factors to be addressed in probation report].) However, the probation report does not address those factors in the context of whether they indicate that defendant would, or would not, "benefit from education, treatment and rehabilitation efforts" such as to warrant DEJ. (§ 790, subd. (d); see *Sergio R., supra,* 106 Cal.App.4th at p. 608 [factors showed minor was unsuitable for DEJ because he was an entrenched gang member, an admitted methamphetamine addict, no longer attended school, and according to this mother was "unmanageable"].) Similarly, whereas the court in rendering judgment made a prefatory remark that it "was concerned with defendant's rehabilitation," the court's comment was not directed at, or made in reference to, the key issue of whether defendant would or would not benefit from rehabilitation efforts such as to warrant DEJ.

Respondent further asserts that the record "establishes the court was properly concerned DEJ would not provide the necessary structure and accountability for appellant, requiring a "more 'restrictive' disposition." We agree the record indicates that the juvenile court denied DEJ principally because the DEJ program, as administered by the local probation department, did not provide defendant with enough supervision. We also note the probation report recommended denying DEJ for the same reason.[3]

---

[3] The probation report also recommended denying DEJ based on the seriousness of the offense and the injury to the victim, factors the prosecutor cited in opposing DEJ.

However, the statutory DEJ scheme permits the juvenile court to impose the supervision it deems necessary for defendant's rehabilitation. In this regard, section 794 states in pertinent part, "When a minor is permitted to participate in a deferred entry of judgment procedure, the judge shall impose, as a condition of probation, the requirement that the minor be subject to warrantless searches of his or her person, residence, or property under his or her control, upon the request of a probation officer or peace officer. The court shall also consider whether imposing random drug or alcohol testing, or both, including urinalysis, would be an appropriate condition of probation. The judge shall also, when appropriate, require the minor to periodically establish compliance with curfew and school attendance requirements. The court may, in consultation with the probation department, *impose any other term of probation authorized by this code that the judge believes would assist in the education, treatment, and rehabilitation of the minor and the prevention of criminal activity*." (*Ibid*, italics added.) Thus, section 794 permits the juvenile court to impose whatever conditions of probation the court deems necessary to a minor's education, treatment and rehabilitation while the minor is on DEJ.

In sum, as stated by the court in *Martha C.*, the DEJ scheme is based on legislative findings that "express not only a strong preference for rehabilitation of first-time nonviolent juvenile offenders but suggest that under appropriate circumstances DEJ is required.[4] This strong preference for rehabilitation and the limitation on the court's power to deny delayed entry of judgment are reflected in the procedures used in considering DEJ." (*Martha C., supra,* 108 Cal.App.4th at p. 561.) Accordingly, while a juvenile court has the discretion to deny DEJ to an eligible and suitable minor, it must exercise that discretion according to "the standard of whether the minor will derive benefit from 'education, treatment, and rehabilitation' rather than a more restrictive commitment." (*Sergio R., supra,* 106 Cal.App.4th at p. 607; *Martha C., supra,* 108 Cal.App.4th at p. 561 [denial of DEJ "is proper only when the trial court finds the minor

---

4 Although defendant detonated an explosive device and caused great bodily injury to an innocent bystander in the process, his offense is treated as "nonviolent" under the DEJ statutory scheme.

would not benefit from education, treatment and rehabilitation"].)) We note in passing that our review of this record discloses that the juvenile court conducted a thorough review of the pertinent reports and letters of recommendation, and also listened attentively to the parties' concerns. Nevertheless, based on our review of the record, we are unable to conclude that the trial court applied the proper standard in its denial of the minor's request for DEJ. Accordingly, we remand this matter for the juvenile court to reconsider whether defendant is suitable for DEJ. (Cf. *Martha C., supra,* 108 Cal.App.4th at p. 562 [ordering juvenile court to reconsider minor's suitability for DEJ after the juvenile court denied DEJ in order to "send a message" to other juvenile drug smugglers that such crimes would carry permanent consequences].)[5]

C. Conditions of Probation

Defendant contends that the condition of probation banning him from possessing bomb-making materials is unconstitutionally vague and overbroad. "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Patently, the condition of probation imposed by the juvenile court relating to bomb-making materials was sufficiently precise for defendant to know that he was prohibited from possessing any of the materials he acquired and used to construct the bomb in question. Regarding its potential application to other materials, the Attorney General states he has no objection to modifying the condition "to require that the possession of or access to such materials must be knowingly done." In our view, the addition of an explicit knowledge requirement would remove any constitutional cloud on this condition of probation. (Cf. *People v. Leon* (2010) 181 Cal.App.4th 943, 949-950 [addition of an explicit knowledge requirement rendered constitutional a condition of probation precluding defendant from associating with gang members].) We leave it to

---

[5] Defendant's suitability for DEJ is for the juvenile court to determine under the appropriate standards and nothing we say today is intended to indicate an opinion on the matter one way or the other.

the parties and the juvenile court, in the first instance, to engraft an appropriate knowledge requirement to this condition of probation upon remand.[6]

Defendant also contends that the condition of probation forbidding use or possession of medical marijuana must be stricken because it was not ordered by the court and because it violates Health and Safety Code section 11362.5 (The Compassionate Use Act of 1996).[7] Nothing in the record indicates that defendant's admitted use of marijuana prior to the bombing was medically related. At the dispositional hearing, the juvenile court made no mention of medical marijuana in its oral pronouncement of the condition of probation that precludes defendant's use of marijuana. The condition relating to medical marijuana, together with certain other applicable conditions, was hand written in capital letters by the clerk on the order containing the court's dispositional findings. Accordingly, because it is not evident from the record that the juvenile court intended to impose this condition of probation, we remand the matter for further clarification.

---

[6] In this regard, we refer the court and the parties for guidance to the recent case in *People v. Freitas* (2009) 179 Cal.App.4th 747, in which the appellate court discussed the scienter requirements necessary to cure two probation conditions (prohibiting defendant from possessing guns/ammunition or stolen property) of being unconstitutionally void for vagueness and overbroad. (See *id.* at pp. 750-752.)

[7] This section provides that the criminal laws relating to the possession and cultivation of marijuana "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health and Saf. Code § 11362.5, subd. (d).)

DISPOSITION

The declaration of wardship is reversed and the case is remanded for reconsideration and clarification consistent with the views expressed in this opinion.

_____
Jenkins, J.

We concur:

_____
Pollak, Acting P. J.

_____
Siggins, J.